

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

In the application of:

OSM MOOSA **APPLICANT**
MOOSA HOLDINGS (PTY) LTD **APPLICANT**

AND

LESOTHO REVENUE AUTHORITY **1ST RESPONDENT**
THE DEPUTY SHERIFF **2ND RESPONDENT**
COMMISSIONER OF POLICE **3RD RESPONDENT**
THE MESSENGER **4TH RESPONDENT**

JUDGMENT

Coram : **L.A. Molete J**
Date of Hearing : **20th September, 2013**
Date of Judgment: **21st February, 2014**

SUMMARY

Tax assessment – Applicants seeking Courts intervention – Whether proper review application before Court – Distress proceedings instituted in the Magistrate Court – High Court not entitled to intervene – Matter within Magistrates Court jurisdiction, or alternatively to be dealt with by the Revenue Appeals Tribunal – High Court only entitled to hear matter on appeal – Applications dismissed.

ANNOTATIONS

CITED CASES

Lesotho Revenue Authority vs Osman and Others 2005

**Metcash Trading Ltd vs Commissioner South African Revenue Service
and another 2001 S.A. 1109 (cc)**

**National Transport Commission and another vs Chetty's Motor Transport
Pty Ltd 1972 (3) S.A. 726 and 735**

S. Mohapi vs Lesotho Revenue Authority CIV/APN/218/2007

**Ashraf Abubaker vs Commissioner for Lesotho Revenue Authority
CCA/50/2011**

STATUTES

Income Tax Act 1993

Subordinate Courts Act No.9 of 1988

High Court Act No.5 of 1978

Revenue Appeal Tribunal Act no2 2005

BOOKS

[1] This matter is an Application by the two Applicants for *a Rule nisi* to be issued in the following terms;

1.1 that the Warrant of Execution issued on 28 February 2013 be suspended or stayed "... *pending the finalisation of this application...*"

- 1.2 that the property attached in terms of the warrant of Execution be released and any property removed be returned to the Applicant
“... *pending finalisation of this application...*”;
- 1.3 that the First Respondent’s actions of directing the Second Respondent to attach the property of the applicant be declared null and void aborigine;
- 1.4 that the Warrant of Execution and the proceedings of the court culminating in the issuing of the Warrant of Execution be set aside;
- 1.5 that the First Respondent be directed to provide to the Applicant all necessary documents and invoices in its possession to enable the Applicant to compute its accounts and remaining issues to its objection against the Notice of Assessment;
- 1.6 that the First Respondent be compelled to provide its decision on the Applicant’s objection to the assessment;
- 1.7 and that if the Court determined that the “...decision on the objection has been waived based on further steps taken by the parties...” that the First Respondent be directed to resume and convene a team to enter into deliberations with the express purpose of resolving any dispute or impasse between the First Respondent and the Applicant and to reconcile the differences and disputes regarding the accounts and taxes as had been agreed mutually between the First Respondent and the Applicant.

- [2] The parties were represented by **Adv. Teele K.C. for Applicant** and **Adv. Mathaba for the Respondents**. On that first hearing date 14th March 2013, the parties counsel agree that dispensation be granted by consent; and further agreed that the Respondents would not sell the attached property until the further order of the court upon determination of this case.
- [3] Subsequently; some two Applications were also brought by Applicant for amendment, and for Joinder, which were not opposed by the Respondents. They were granted by consent. It is important to note that though argued jointly, these matters were separately brought by the two Applicants. The relief sought was the same.
- [4] The matters were finally ready and proceeded to hearing on the 20th September 2013. At that stage appeared **Adv. M. Teele K.C. for Applicants** and **Adv. B. Roux S.C. for the Respondents with Mr M. Dichaba**. Counsel agreed that the matters be heard together as the relief sought in both was similar. Except that as Respondents counsel argued, the amendment of the 21st June 2013 to include the prayer for the first Respondent to show cause “..why his decision on the issuance of the distress order and the writ of Execution against the Applicant shall not be reviewed and set aside for being unreasonable and arbitrary” introduced a review element into the matter. This aspect will be addressed later in this judgment.
- [5] The facts of this case are briefly that the during or around the period November 2011 to March 2012, first Respondent issued a notice of amended assessment to the two Applicants pursuant to the provisions of the Income Tax Act 1993. The assessment imposed a tax liability in excess

of one hundred and sixteen million on the Applicants over a number of years.

- [6] The applicants then sought access to certain books and documents that related to the tax years, having also requested time to conclude “a detailed analysis of the state of affairs”. Applicants intimated an intention to object to the assessments. In terms of the law the Applicants had 60 days to object to the amended assessments. ¹
- [7] The Applicants then engaged in correspondence with the 1st Respondent, seeking various books and documents. The 1st Respondent concluded that this was meant to delay the tax recovery; and that in any event some of the documents requested had no relevance to the principal part of the tax liability.
- [8] It is common cause that at the time of bringing the Application on the 14th March 2013 some of the documents had not been made available to the Applicants. First Respondent even says the letter of objection of O.S.M Moosa disappeared in its files and was subsequently found to be in the possession of Applicant, and accordingly could not serve the Applicant with its objection decision.
- [9] It is also common cause that Applicants made an offer to settle by instalments of M20,000-00 in one case and M50,000-00 in the other, which 1st Respondent considered to be inadequate and unrealistic and refused the offers. It therefore sought to enforce the execution or distress order.

¹ Section 137(2) Income Tax Act

[10] On the 27th February 2013 in the matter of **Moosa Holdings (PTY) Ltd** and on the 7th March 2013 in the case of **O.S.M Moosa**; the first Respondent had obtained judgment in the Magistrates' Court for recovery of the tax assessed to be due; and followed that by issuance of a distress order, thus invoking the provisions of Section 147 of the Income Tax Act 1993. This precipitated the Applications now before this Court.

[11] It is to be noted that in terms of the provisions of Section 137(6) of the Income Tax Act it is provided that;

“If the Commissioner General has not made an objection decision within 90 days of the objection being filed, the Commissioner General is deemed to have made the decision to disallow the objection and to have served notice of the decision on that day.”

[12] The Applicants perceived the issues arising in the two matters as follows;

- (a) Whether the Applicants cannot raise the on-going discussions in the face of Section 137 of the Act. In other words whether Section 137 (6) precludes Applicants from relying on the discussions it had with the LRA with a view to reduction or even possible elimination of its liability.
- (b) Whether the Applicant has made out a case for the review of the recovery measures of the Act. In other words whether resort to the recovery measures is, arbitrary; mala fide or unreasonable in the circumstances and therefore reviewable.

- (c) And if the court finds in favour of the Applicants in this regard, there is no doubt that its power to intervene has been recognised and established in Lesotho and in South Africa.

Lesotho Revenue Authority vs Osman and others²

Metcash Trading Ltd vs Commissioner Revenue Service and Another³

[13] The first Respondent on the other hand took a completely different approach and contended that the Court does not have jurisdiction to consider the matter. It was submitted by counsel that;

- (a) The relief claimed in prayers 2(a), 2(b), 2(c) and 2(d) (being 2(c) and 2(d) in the OSM Moosa case) relevant to the Warrant of Execution cannot be granted, because this Court cannot set aside or stay a warrant issued out of the Magistrates Court.
- (b) It was further submitted that the relief claimed in prayers 2(e), 2(f) and 2(g) (being 2(a), 2(b) and 2(c) in O.S.M Moosa case) are related and depend on the validity of both the amended assessment and the distress order. The court can only set aside the distress order if it has the jurisdiction to consider the validity or otherwise of the assessment, which it does not have. Where an Applicant is dissatisfied with any assessment, he should have appealed to the Revenue Appeals Tribunal in terms of the Act No.2 of 2005.

² 2006 LAC 346

³ 2001 (1) S.A. 1109

- (c) The Applicants; it was submitted, sought to convert the original Application into a review without joining all the necessary parties; i.e. the Commissioner General, and without laying a proper basis or foundation for review in their founding affidavits.

[14] It is convenient to start with the last submission. It is so because in both cases, the Applicants only introduced the amendment at the later stage and also applied for joinder, which were not opposed by Respondents.

The grounds for review were certainly not set out in the founding Affidavit. It is trite law that the grounds for any review and facts and circumstances upon which the Applicant wishes to rely must be set out in the founding Affidavit.

[15] It is in the nature of a review that Applicant has to show that the Tribunal failed to apply its mind to the relevant issues in accordance with the “behests of the statute and the tenets of natural justice”.⁴

[16] Such failure of the tribunal may be shown by proof “*inter-alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior motive or improper purpose----- or took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind the matter in the manner aforestated.”⁵

⁴ Johannesburg Stock exchange and another v Witwatersrand Nigel and another 1988(3) SA 132 at 152A-E

⁵ National Transport Commission and Another v Chetty's Motor Transport Pty Ltd S.A. 726 and 735

[17] The above requirements make it impossible to speculate or perceive how any review can be based on facts or allegations contained in the replying affidavit and not in the founding affidavit. The court is therefore unable to grant the relief based on the amendment which introduces a review application without a proper foundation.

[18] It would perhaps present a different scenario if the revenue authority had accepted the offer by the tax payers to settle the debt by instalments; or at least promised to consider it. The tax payers could then supposedly be heard to say they were misled into the assumption that no recovery measures would be invoked. They would still have to make the allegation and proper basis for their case in the founding Affidavit. On the papers before court however, it is common cause that the offers were rejected outright and no impression was ever created that enforcement measures would not be resorted to by Respondent. Indeed it is the very resort to the distress order that brought about the applications.

[19] It is my view that the other points *in limine* raised by the Respondent relating to jurisdiction of this Court are also valid.

[20] According our law, specifically Section 37 the Subordinates Court Act No.9 of 1988, that Court is specifically empowered to stay or set aside a warrant of execution issued by it. It reads;

"The court may; on good cause shown, stay or set aside any warrant of execution or arrest issued by such court"

[21] The High Court can only do that in exercise of its inherent powers; but the **High Court Act 1978** also prohibits this Court from occurring by specifically depriving it of jurisdiction to hear and determine matters that are within the jurisdiction of the Subordinate Courts. In terms of Section 6:

“No civil cause or action within the jurisdiction of a subordinate (which expression includes a local or central court; shall be instituted in or removed into the High Court save:-

- (a) by a Judge of the High Court acting of his own motion or*
- (b) with the leave of a Judge upon application made to him in chambers, and after notice to the other party”⁶*

The stay of execution or setting aside of the warrant of execution is not covered in the exceptional cases provided for under Section 6. Accordingly this Court has no jurisdiction to interfere.

[22] The second point *in limine* is taken against what counsel submits is the incorrect assumption that the High Court has jurisdiction to consider or reconsider any assessment or amended assessment on account of the Applicants dissatisfaction with the same.

[23] Procedurally, the matter of any amended assessment with which any party is not satisfied should be referred to the **Revenue Appeals Tribunal** in

⁶ High Court Act No.5 of 1978, Section 6

terms of that Act. (Act No.2 of 2005 Sections 3(1) and 3(2) (c)). In that event, the High Court is only approached on appeal where the decision of the Revenue Appeals Tribunal is not acceptable to the concerned party.

[24] This is established in our law and on the authority of the following cases;

1. **S. Mohapi vs Lesotho Revenue Authority** ⁷
2. **Ashraf Abubaker vs Commissioner for Lesotho; Revenue Authority**⁸.
4. **Metcash Trading Ltd vs Commissioner South African Revenue Service and another**⁹

We have precedent to the effect that where mechanisms and specialised institutions exist for the resolution of matters relating to taxation, then they should be resorted to and courts should only interfere where necessary and as provided by law, that is on appeal in our case.

[25] In the circumstances and for the reasons set out above the order I make is as follows:

The Applications are dismissed with costs.



L.A. MOLETE
JUDGE

For the Applicant : Advocate M Teele K.C.
For Respondents : Advocate B. Roux S.C (with Mr M. Dichaba)

⁷ CIV/APN/218/2007

⁸ CCA/50/2011

⁹ 2001 S.A. 1109 (cc)